Supreme Court, U.S.

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No.

In the Supreme Court of the United States

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

DAREN LIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1231(a)(1) of Title 8 of the United States Code provides that when an alien has been ordered removed from the United States, the Attorney General shall remove the alien within 90 days. Section 1231(a)(2) requires the detention during the 90-day removal period of aliens who have been found removable based on a conviction for an aggravated felony. Section 1231(a)(6) then provides, in relevant part, that an alien who is removable for having committed an aggravated felony or "who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." 8 U.S.C. 1231(a)(6) (Supp. IV 1998). The question presented is:

Whether the Attorney General is authorized to continue to detain an alien beyond the 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the country but the Attorney General has determined that the alien would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review.

PARTIES TO THE PROCEEDINGS

Petitioners are Janet Reno, the Attorney General of the United States, the Immigration and Naturalization Service (INS), and the INS District Director in Seattle, Washington. Petitioners were respondents in the district court and appellants in the court of appeals. Respondent is Daren Lim, who brought the instant petition for a writ of habeas corpus in the district court and was appellee in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statutory provisions involved	2
Statement	4
Argument	7
Conclusion	8
Appendix A	1a
Appendix B	3a
Appendix C	5a

TABLE OF AUTHORITIES

Cases:

Ma v. *Reno*, 208 F.3d 815 (9th Cir.), cert. granted, 121 S. Ct. 297 (2000)	7, 8
Phan v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999)	6
Zadvydas v. *Underdown*, 185 F.3d 279 (5th Cir. 1999), cert. granted, 121 S. Ct. 297 (2000)	8

Statutes:

8 U.S.C. 1101(a)(43) (Supp. IV 1998)	4
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998)	4
8 U.S.C. 1231(a) (Supp. IV 1998)	2, 3
8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998)	2, 7
8 U.S.C. 1231(a)(6) (Supp. IV 1998)	3, 5, 7, 8
28 U.S.C. 2241	6

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-2a) is unreported. The order of the district court granting the petition for writ of habeas corpus (App., *infra*, 3a-4a) and the report and recommendation of the magistrate judge adopted by the district court (App., *infra*, 5a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1231(a) of Title 8 of the United States Code provides in relevant part:

Detention and removal of aliens ordered removed

(a) Detention, release, and removal of aliens ordered removed

(1) Removal period

(A) In general

Except as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the "removal period").

* * * * *

(2) Detention

During the removal period, the Attorney General shall detain the alien. Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2) or 1182(a)(3)(B) of this title or deportable under section 1227(a)(2) or 1227(a)(4)(B) of this title.

(3) Supervision after 90-day period

If the alien does not leave or is not removed within the removal period, the alien, pending removal, shall be subject to supervision under regulations prescribed by the Attorney General. The regulations shall include provisions requiring the alien—

(A) to appear before an immigration officer periodically for identification;

(B) to submit, if necessary, to a medical and psychiatric examination at the expense of the United States Government;

(C) to give information under oath about the alien's nationality, circumstances, habits, associations, and activities, and other information the Attorney General considers appropriate; and

(D) to obey reasonable written restrictions on the alien's conduct or activities that the Attorney General prescribes for the alien.

* * * * *

(6) Inadmissible or criminal aliens

An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C), 1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. 1231(a) (Supp. IV 1998).

STATEMENT

1. a. Respondent is a native and citizen of Cambodia. App., *infra*, 7a. He entered the United States as a refugee on March 20, 1983. *Ibid.* On November 19, 1984, he adjusted his status to lawful permanent resident. *Ibid.*

On November 26, 1997, the Immigration and Naturalization Service (INS) served respondent with a notice to appear for removal proceedings, charging respondent with being subject to removal from the United States under 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998), because he had been convicted of an aggravated felony, which includes a crime of violence for which a term of imprisonment imposed was one year or more. Administrative Record (A.R.) L71.[1] That charge was based on respondent's conviction in state court on April 30, 1992, of rape in the second degree. *Ibid.*[2]

Respondent's rape conviction arose out of an incident during which respondent, "along with one adult male and one juvenile male entered a house armed with a .38 caliber handgun and a .22 caliber rifle. They proceeded to order the occupants to lay down on the floor. They then told the occupants that they would kill them if they did not reveal where their money was hidden. At this time they ordered one of the females into a nearby bedroom where [respondent] engaged in sexual intercourse with her. After this act was completed, they

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[1] Rape is also expressly indentified as an aggravated felony. 8 U.S.C. 1101(a)(43) (Supp. IV 1998).

[2] The Notice to Appear named respondent Daren Lim as the respondent, but also noted the alias "Chan Than Sath." A.R. L71. The Administrative Record reveals that respondent has also used the alias "Chanthan Kevin Sath." A.R. L41-L57.

continued to steal $1,000.00 in cash, numerous pieces of gold jewelry and other personal property from the occupants." A.R. L4; see also A.R. L44. The police were called to the residence while the robbery was in progress, found respondent and his accomplices hiding in the house, and recovered from them the stolen jewelry and currency, the two weapons, as well as the electrical cord they had used to tie up the victims. A.R. L44-L45. In addition to being convicted of rape in the second degree, respondent also was convicted of robbery in the first degree. App., *infra*, 7a. Respondent was sentenced to 82 months' imprisonment on the rape conviction, and to 54 months' imprisonment on the robbery conviction, to run concurrently. *Ibid.*; A.R. L3-L4, L52.

Respondent was transferred to the custody of the INS on November 17, 1997. App., *infra*, 7a.

b. On December 10, 1997, an immigration judge found that respondent was subject to removal as charged. A.R. L40. The immigration judge noted that respondent had made no application for relief from removal. *Ibid.* The immigration judge ordered that respondent be removed to Cambodia. Respondent did not appeal that order to the Board of Immigration Appeals, and thus his removal order became final. App., *infra*, 7a.

c. On December 16, 1997, the INS requested travel documents for respondent from the consulate of Cambodia. App., *infra*, 8a. The Cambodian government has not responded to the request, and therefore the INS has been unable to effectuate respondent's removal. *Ibid.* The INS continued to detain respondent under 8 U.S.C. 1231(a)(6) (Supp. IV 1998), subject to periodic administrative reviews of his custody. On May 14, 1999, the INS notified respondent that it would be reviewing

his custody status. A.R. L4. After interviewing respondent, who had the assistance of counsel, the INS informed respondent on June 23, 1999, that he would be continued in INS detention and his custody would be reviewed next on December 23, 1999. A.R. L1. An INS headquarters review panel reviewed that June 23, 1999, custody decision and agreed with the determination to continue respondent in custody, citing the circumstances surrounding respondent's criminal offenses, which indicated that respondent is a violent and dangerous individual who would pose a substantial risk to the community if released. 9/12/99 Headquarters Review Committee; Letter from Assistant District Director Morones (Sept. 24, 1999).

2. a. Meanwhile, on April 27, 1999, respondent filed a petition for habeas corpus relief under 28 U.S.C. 2241 in the United States District Court for the Western District of Washington, challenging the constitutionality of his continued detention. App., *infra*, 8a. On December 8, 1999, the district court adopted the report and recommendation of a magistrate judge and granted the respondent's habeas corpus petition. *Id.* at 3a-4a. The court applied the standards set forth in the joint order of five judges of the district court in *Phan* v. *Reno*, 56 F. Supp. 2d 1149 (W.D. Wash. 1999), for evaluating such constitutional challenges to continued detention beyond the initial 90-day removal period. See App., *infra*, 5a-6a. The court first concluded that there is no realistic prospect that respondent would be removed to Cambodia in the foreseeable future. *Id.* at 10a-12a. The court also found that the government had not made a compelling showing that respondent's detention was necessary to further the government's interests in preventing respondent's flight or protecting the public. *Id.* at 12a. The court concluded that

respondent's continued detention was excessive in relation to the government's regulatory goals and, therefore, violated his substantive right to due process. *Id.* at 15a. The court declined to remand the case for further consideration under the INS's review procedures, finding that the procedures did not comply with the directives contained in the *Phan* joint order. *Ibid.*

b. On April 10, 2000, the Ninth Circuit issued its decision in *Ma* v. *Reno*, 208 F.3d 815, holding that the INS lacked authority as a statutory matter under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) to detain an alien beyond the initial 90-day removal period described in 8 U.S.C. 1231(a)(1)(A) (Supp. IV 1998), notwithstanding that the Attorney General had continued to detain the alien because he posed a risk to the community, the alien's detention was subject to periodic administrative review, and the country to which the alien was ordered removed (Cambodia) is engaged in ongoing negotiations with the United States concerning a process for the return of its nationals ordered removed by the INS. The Ninth Circuit in *Ma* did not reach the constitutional grounds on which the district court had relied.

c. On August 14, 2000, the court of appeals entered an order summarily affirming the district court's judgment in this case on the basis of its decision in *Ma*. App., *infra*, 1a-2a.

ARGUMENT

This case presents the question whether the Attorney General is authorized to continue to detain an alien beyond the initial 90-day removal period under 8 U.S.C. 1231(a)(6) (Supp. IV 1998) if the alien cannot be removed immediately from the United States but the Attorney General has determined that the alien

would pose a risk of flight or danger to the community if released and the alien's custody is subject to periodic administrative review. The court of appeals summarily affirmed the judgment of the district court in light of its holding in *Ma* v. *Reno*, 208 F.3d 815 (2000), that the INS lacks such authority.

On October 10, 2000, this Court granted the petition for a writ of certiorari in *Reno* v. *Ma*, 121 S. Ct. 297, to review that decision of the Ninth Circuit. On the same date, the Court also granted the petition for a writ of certiorari in *Zadvydas* v. *Underdown*, 121 S. Ct. 297, to review a decision of the Fifth Circuit (185 F.3d 279 (1999)) that rejected a constitutional challenge to continued detention under Section 1231(a)(6), without questioning the statutory authority of the Attorney General to detain an alien in such circumstances. Because the question presented in this case is already before the Court in *Ma* and *Zadvydas*, the petition for a writ of certiorari should be held pending the Court's decisions in those cases.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decisions in *Reno* v. *Ma*, No. 00-38, and *Zadvydas* v. *Underdown*, No. 99-7791, and then be disposed of as appropriate in light of the decisions in those cases.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-36191
DC# CV-99-528-Z
Western Washington (Seattle)

DAREN LIM, PETITIONER-APPELLEE

v.

JANET RENO, ATTORNEY GENERAL; ET AL.,
RESPONDENTS-APPELLANTS

[Filed: Aug. 14, 2000]

ORDER

Before: WALLACE, SCHROEDER and THOMAS, Circuit Judges

Appellee's motion to file late his response to appellants' response to the court's order to show cause is granted. The Clerk shall file appellee's response received on July 11, 2000.

The court has received and reviewed the parties' responses to this court's order to show cause why summary disposition would not be appropriate in light of *Ma v. Reno*, 208 F.3d 815 (9th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. ___ (U.S. July 5, 2000) (No. 00-

38). Appellants' opposed request that the court either hold this appeal in abeyance pending the United States Supreme Court's disposition of appellants' petition for writ of certiorari in *Ma*, or grant appellants an extension of time to file the opening brief is denied.

Pursuant to *Ma*, the court grants appellee's oppose request for summary affirmance of the district court's judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-528Z

DAREN LIM, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

[Filed: Dec. 8, 1999]

**ORDER GRANTING PETITION
FOR WRIT OF HABEAS CORPUS**

The Court, having reviewed the Petition for Habeas Corpus, the government's Status Report and Recommendation and Supplement to Status Report and Recommendation, petitioner's Response, both parties' exhibits, petitioner's supplemental exhibits, the Report and Recommendation of the Honorable David E. Wilson, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) The Court finds petitioner's continued detention violates his substantive due process rights as a matter of law;

(3) Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) is GRANTED;

(4) Petitioner shall be released from INS custody, within two business days after entry of this Order, on conditions set by the INS;

(5) Such conditions may include those set forth in 8 C.F.R. § 241.5(a); and

(6) The Clerk is directed to send copies of this Order to counsel for both parties and to the Honorable David E. Wilson.

DATED this 8th day of December, 1999.

/s/ THOMAS S. ZILLY
THOMAS S. ZILLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C99-528Z

DAREN LIM, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.,
RESPONDENTS

[Filed: Oct. 28, 1999]

REPORT AND RECOMMENDATION

I. INTRODUCTION

This Petition is one of over one hundred § 2241 petitions filed in this Court. These petitions raise the same common legal issues: whether the Immigration and Naturalization Service's detention of aliens, who have been ordered deported to countries that refuse to receive them, violates their substantive and procedural due process rights under the Fifth Amendment to the United States Constitution. On July 9, 1999, this Court decided, in its Joint Order, the common legal issues presented in five "lead" cases (hereinafter referred to as the "Joint Order"). *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, 1999 WL 521980 (W.D. Wash. July 9, 1999). Therein,

the Court constructed a procedural framework for review and analysis of each petitioner's substantive and procedural claims. By separate orders, the United States District Judges who participated in the Joint Order applied the appropriate due process framework to each of their respective "lead" cases to determine whether continued detention violated each petitioner's constitutional rights.

This case has been referred to the undersigned United States Magistrate Judge, pursuant to Title 28 U.S.C. § 636(b)(1), Local Magistrates' Rules MJR 3 and MJR 4, and Federal Rule of Civil Procedure 72. (Doc. #2). This Court has now carefully reviewed Petitioner's Petition, Respondents' Status Report and Recommendation and Supplement to Status Report and Recommendation, Petitioner's Response to the Status Report and Recommendation, both parties' exhibits and the remaining record. In issuing this Report and Recommendation, the Court has applied the framework set forth in the Joint Order to the facts of this case and does hereby incorporate, by reference, the Joint Order governing issues common to all petitioners. In so doing, the Court has found there is no realistic chance that the government will effectuate Petitioner's deportation to Cambodia. This Court therefore recommends that Petitioner's continued detention be found to violate his substantive due process rights as a matter of law. Even if the District Court balances the Respondents' interest in detention against the dangerousness and flight risk presented by release, this Court still recommends the District Court find the balance tips sharply in favor of Petitioner's release.

Accordingly, the Court recommends that Petitioner's Petition for Writ of Habeas Corpus be GRANTED and that Petitioner be ORDERED released immediately, on conditions to be set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a).

II. FACTUAL BACKGROUND

Petitioner was born in Cambodia on June 20, 1971. (Doc. #11 at L0076) (Petitioner's Administrative Record). On March 20, 1983, Petitioner entered the United States as a refugee. (*See id.* at L0004; L0071). He was accorded the status of a lawful permanent resident on November 19, 1984 retroactive to the date of his admission as a refugee. (*Id.*). Petitioner's mother, two brothers and aunt reside in Lowell, Massachusetts. (*Id.*).

On April 30, 1992, Petitioner was convicted on one count of robbery in the first degree with a deadly weapon and one count of rape in the second degree with a deadly weapon in the Superior Court of Washington, King County and sentenced to 82 months and 54 months to run concurrently. (*Id.* at L0063-70). On November 17, 1997, the INS took Petitioner into custody. (*Id.* at L0003). The INS commenced deportation proceedings against him on November 26, 1997. (*Id.* at L0071-72). On December 12, 1997, Petitioner was ordered deported to Cambodia. (*Id.* at L0040). Although Petitioner reserved his right to appeal his order of deportation to the Board of Immigration Appeals, he never actually appealed the decision. (*Id.*). Accordingly, his order of deportation became final when his thirty-day period to appeal expired. (Doc. #10 at 2).

Petitioner remains confined at the Federal Detention Center in Seatac, Washington.

Travel documents for Petitioner were first requested on December 16, 1996. (Doc. #11 at R0005). Because there has been no response from the Cambodian embassy, Petitioner's deportation has not been carried out, and he remains detained. (Doc. #10 at 2). Petitioner has therefore been subject to a final order of deportation since January 12, 1998, and has been held in INS custody, pending deportation, since November 17, 1997.

On April 27, 1999, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. #5). In his petition, Petitioner alleges that his detention violates his right to substantive and procedural due process under the Fifth Amendment. (Doc. #5 at 3). In addition, Petitioner contends that the INS was required by statute either to deport him or to release him after six months in custody.[3] (*Id.*). Petitioner's petition names INS as the sole respondent, but the Attorney General and the INS District Director are proper respondents in this action and they have appeared through counsel and have filed briefs in opposition to the petition. After considering Petitioner's petition, the Federal Public Defender was appointed to represent Petitioner on June 28, 1999. (Doc. #7).

On December 30, 1998, Petitioner pro se requested that he be released from detention. (Doc. #11 at L0024-25). It appears that the INS never answered his request. On April 29, 1999, Petitioner, along with the

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[3] Because neither the Petitioner nor the government address this issue further in their briefs, the Court declines to address the issue herein.

assistance of his appointed counsel, again requested that the INS release him from custody. (Doc. #12, Ex. A at 4). Along with his request, Petitioner submitted a personal statement and several letters of support from friends and relatives. (Doc. #12, Ex. A at 4, Ex. E). On May 18, 1999, Petitioner and his counsel met with an INS Deportation Officer regarding his request for release. (Doc. #12, Ex. A at 4). However, on June 23, 1999, the Assistant District Director for Detention and Deportation, George L. Morones, denied Petitioner's request for release. (Doc. #11 at L0001). Petitioner remains confined at the Federal Detention Center in Seatac, Washington.

II. DUE PROCESS ANALYSIS

As stated above, by Order of July 9, 1999, the Court resolved the common issues presented by the indefinite detention cases. First, the Court found it had jurisdiction to consider the constitutionality of a petitioner's challenge to his detention, in the context of a § 2241 petition. Second, the Court held a petitioner need not exhaust administrative remedies before seeking a writ of habeas corpus pursuant to § 2241. Finally, the Court set forth a due process framework to be applied in all pending indefinite detention cases.

The Court's Joint Order is now the law of this case. *See United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (stating that under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case[]") (citing *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)). Accordingly, this Court does not re-visit any of the above issues, even though a significant portion of

the Respondents' Status Report and Recommendation is dedicated to its "disagreements" with the Joint Order.[4] (Doc. #10 at 4-9).

With regard to the proper procedural framework, the Joint Order states that the critical inquiry is whether an alien's detention is excessive in relation to the government's legitimate interests in ensuring the removal of an alien ordered deported and in protecting the public from dangerous felons. *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, 1999 WL 521980, at *6 (W.D. Wash. July 9, 1999). The Court concluded that:

> Dangerousness and flight risk are thus permissible considerations and may, in certain situations, warrant continued detention, but only if there is a realistic chance that an alien will be deported. Detention by the INS can be lawful only in aid of deportation. Thus, it is "excessive" to detain an alien indefinitely if deportation will never occur.

See id. In light of the foregoing, the Court now applies the framework set forth in the Joint Order to the facts of this case.

A. Likelihood of Deportation

Based upon the evidence and arguments presented in this case, the Court finds that there is no realistic prospect that Petitioner will be deported in the foreseeable future to Cambodia. The government has

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[4] Specifically, the Court has not addressed the Fifth Circuit Court of Appeals' recent decision in *Zadvydas v. Underdown*, No. 97-31345, 1999 WL 604311, at *14 (5th Cir. Aug. 11, 1999) and the Third Circuit Court of Appeals' decision in *Ngo v. INS*, 1999 WL 744015 (3rd Cir. Sept. 24, 1999).

presented information identifying the efforts which have been made, and which will be made to effectuate Petitioner's deportation, and some very scant reasons to hope that future efforts might be more successful than past efforts. (Docs. #10; #18, Ex. D, Declarations of James G. Hergen.) The Court notes, however, that the government requested travel documents from Cambodia—in an attempt to effectuate Petitioner's deportation and has yet to receive any response. (Doc. #11 at R0005).

Moreover, this Court recently held in *Ma v. Reno, et al.*, Case No. 99-151L, one of the lead cases, that due to the fact that the United States has taken only "the first step toward enabling deportations to Cambodia[]," and that negotiations with Cambodia are dependent upon negotiations with Vietnam, with whom the United States has yet to obtain a repatriation agreement, "there is not a realistic chance that the government will accomplish Ma's deportation to Cambodia." *Ma v. Reno, et al.*, Case No. C99-151L, "Order Granting Writ of Habeas Corpus," Docket 52 at 4. Here, the government submits the affidavits of James A. Hergen to support its contention that deportation to Cambodia is foreseeable because the government has recently approved formal negotiations with Cambodia regarding a repatriation agreement and presented a formal draft repatriation agreement to the Cambodian government. (Docs. #11 and #18, Declarations of James G. Hergen). However, this evidence does not affirmatively demonstrate that the United States will establish a repatriation agreement with Cambodia in the foreseeable future or that the government of Cambodia has reciprocated to the efforts of the United States regarding a possible repatriation agreement. Therefore, neither the

Deputy Secretary of State's approval of *commencement* of negotiations with Cambodia nor the formal presentation of a draft agreement to the government of Cambodia demonstrate that Petitioner is likely to be deported to that country in the foreseeable future.

Based upon the evidence, there does not appear to be a definitive end to Petitioner's detention. Reading the Joint Order literally, this would suggest that the Court should not even examine the questions of Petitioner's flight risk and dangerousness, as there is no realistic chance that Petitioner will be deported. Because detention by the government can be lawful only in aid of deportation, and deportation in this case cannot be effectuated, the Court recommends that Petitioner's continued detention be found "excessive" and in violation of his substantive due process rights. Notwithstanding this determination, the District Court might interpret the Joint Order to require a balancing of flight risk and dangerousness. Accordingly, this Court has analyzed these factors as well.

B. Flight Risk and Dangerousness

Based upon the evidence in the record, the government has not made a compelling showing that detention of Petitioner is necessary to foster the government's secondary goals of preventing flight prior to deportation and protecting the public from dangerous felons. *See Phan v. Reno*, Nos. C98-234Z, C99-151L, C99-177C, C99-185R, C99-341WD, 1999 WL 521980, at *5 (W.D. Wash. July 9, 1999). First, there is no evidence to suggest that Petitioner is a flight risk. In fact, the government does not make an argument in support of their contention. (Doc. #10 at 10). Instead, it merely relies on Petitioner's criminal conviction, cites statistics and

claims that Petitioner will likely abscond if released. (*Id.*). Respondents' further arguments relating to substantive due process do not focus at all on Petitioner's risk of flight or dangerousness to the community, but instead concentrate on rearguing issues previously decided in the Joint Order.

The evidence before the Court reveals, however, that the Petitioner has strong family ties and community ties in Lowell, Massachusetts. (Doc. #12, Ex. A at 4, Ex. E). These ties include his mother, his two brothers, an aunt and numerous friends in this community. (*See id.*) His family has offered to provide him a residence and to support him upon his release. (*See id.*). The Director and members of the Holy Union Asian Center in Lowell, Massachusetts have also offered their assistance in supporting and helping Petitioner find gainful employment. These facts suggest Petitioner poses a minimal risk of flight if he is released.

As to Petitioner's criminal history, he has committed offenses for which he as [*sic*] served his full sentences. In *Ma v. Reno, et al.*, Case No. C99-151L, the petitioner and two other gang members were involved in the killing of another gang member. While the jury was unable to reach a verdict on a second degree murder charge, the petitioner was convicted of manslaughter in the first degree. Despite the extreme seriousness of this incident and conviction, Judge Lasnik of this court held:

> Even if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond.

> The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

Ma v. Reno, et al., Case No. C99-151L, "Order Granting Writ of Habeas Corpus," Docket 52 at 4-5 (footnote omitted). In footnotes supporting the conclusion that petitioner did not pose a substantial danger, the Court cited evidence of Ma's relationships with his parents and siblings, employment prospects, and plans to avoid gang relationships and criminal behavior. The Court also noted Ma's youth at the time of the offense, the fact that the jury found him less culpable than the government's portrayal, and the relative brevity of the sentence imposed.

Here, Petitioner was convicted of the extremely serious and dangerous crimes of robbery in the first degree with a deadly weapon and rape in the second degree with a deadly weapon in the present case. Although Petitioner was convicted of these serious crimes, the convictions are less serious than Ma's conviction, which arose from a gang-related killing. If the government's showing of dangerousness in *Ma* was not sufficient to justify indefinite detention, the Court should reach the same conclusion in this case, where Petitioner has a less serious criminal history. Even were the Court to conclude that Petitioner remains a danger to society, such a finding alone, is insufficient to justify indefinite detention. *See Kansas v. Hendricks*,

521 U.S. 346, 358 (1997) (holding that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment[]").

Thus, in balancing the much diminished government interest in extending Petitioner's detention indefinitely against the very narrow likelihood the government will effectuate deportation in the foreseeable future and the very strong constitutional interest at stake, the Court recommends that Petitioner's detention be found excessive in relation to the government's regulatory goals. Consequently, the Court recommends that the government's continued detention of Petitioner be found to violate Petitioner's substantive due process rights as guaranteed by the Fifth Amendment to the United States Constitution.

Because the Court recommends that Petitioner's substantive due process rights be found to be violated, the Court need not reach Petitioner's procedural due process claim. *See United States v. Salerno*, 481 U.S. 739, 746 (1987). The Court, however, is required to address this issue briefly, as the government contends the Court should not make a decision as to Petitioner's release, but should allow Petitioner to make use of the new Immigration and Naturalization Service procedures for review of detention. (Doc. #13). The Court recommends that this case not be remanded because, among other reasons, the new INS procedures do not comply with the directives contained in the Joint Order. (Doc. #13).

III. CONCLUSION

Having considered and weighed all the relevant factors, the Court recommends that the District Court find there is no realistic chance that the government will effectuate Petitioner's deportation to Cambodia. Accordingly, the District Court should conclude Petitioner's continued detention violates his substantive due process rights as a matter of law. Even if the District Court decides to balance the government's interest in detention against the dangerousness and flight risk presented by release, the balance still tips sharply in favor of Petitioner's release. Accordingly, Petitioner should be released immediately, on conditions to be set by the INS. Such conditions may include those set forth in 8 C.F.R. § 241.5(a). A proposed order accompanies this Report and Recommendation.

Dated this 28th day of October, 1999.

/s/ DAVID E. WILSON
DAVID E. WILSON
United States Magistrate Judge